

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 17 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2009-0218-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
JOSE G. SANCHEZ, JR.,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR-98-023780

Honorable Boyd T. Johnson, Judge

REVIEW GRANTED; RELIEF DENIED

\_\_\_\_\_  
Jose G. Sanchez, Jr.

Florence  
In Propria Persona

\_\_\_\_\_  
K E L L Y, Judge.

¶1 Petitioner Jose Sanchez, originally charged with first-degree murder, pleaded guilty to a reduced charge of manslaughter in 1999 pursuant to a plea agreement. The trial court accepted Sanchez's plea and the terms of the plea agreement, including a stipulated sentence, and sentenced him accordingly to a seventeen-year term of imprisonment. In 2008, Sanchez filed a pro se notice of post-conviction relief pursuant to

Rule 32, Ariz. R. Crim. P., alleging he learned, after sentencing, of his diagnosis with hepatitis C, “a chronic, uncorrectable[,] and life threatening viral liver disease.” In his petition, Sanchez asked the court to conduct an evidentiary hearing on his claim and vacate his sentence.<sup>1</sup> The trial court summarily denied relief, finding Sanchez “ha[d] failed to present sufficient factual evidence to sustain a colorable claim to relief.” The court continued,

[F]urther, the request for relief was not timely filed after discovery of the “newly discovered evidence”; and, there is no legal basis upon which the Defendant could retain the benefit of a reduced charge which he received through the plea agreement and still be entitled to a modified sentence as he requests.

¶2 On review, Sanchez challenges the trial court’s denial of relief without an evidentiary hearing. Specifically, he maintains the delay in filing his claim was the fault of counsel, stating he “ha[d] no control as to when the attorney file[d].” He further argues the court was mistaken that his request for a modified sentence to a reduced charge was without legal basis. We will not disturb a trial court’s ruling on a petition for

---

<sup>1</sup>Although we assume Sanchez ultimately seeks to be resentenced to a shorter term, his petition for post-conviction relief requested only that his sentence be vacated. Sanchez’s reason for limiting his request in this manner might be explained by *State v. Cooper*, 166 Ariz. 126, 800 P.2d 992 (App. 1990). In *Cooper*, Division One of this court held that, as long as a defendant has established newly discovered material facts entitling him to relief under Rule 32.1(e), a trial court is not precluded from vacating a pleading defendant’s stipulated sentence. *Id.* at 129, 131, 800 P.2d at 995, 997. But, according to *Cooper*, if a court grants Rule 32 relief by vacating the sentence, it must then afford both the state and the petitioner the opportunity to withdraw from the plea agreement. *Id.* at 131, 800 P.2d at 997. If neither party moves to withdraw, the court may then resentence the petitioner on the charge to which he pleaded guilty. *Id.* Thus, under *Cooper*, Sanchez could only be resentenced for a conviction on the reduced charge of manslaughter with the state’s acquiescence.

post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find none here.

¶3 We conclude the court did not abuse its discretion in finding Sanchez had failed to state a colorable claim under Rule 32.1(e). Among other requirements, to state a colorable claim for relief based on newly discovered evidence, a defendant's Rule 32 petition "must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention." *State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989). In documents filed with the court, it appears Sanchez was diagnosed with hepatitis C in 2002, although he avers he did not appreciate the potential severity of the disease until 2003. With respect to his subsequent five-year delay in bringing his diagnosis to the court's attention, Sanchez states only that he had been unaware, until 2008, that the diagnosis might be relevant to his sentence.<sup>2</sup> We cannot say the trial court abused its discretion in finding Sanchez's statement was insufficient to show he had been diligent in bringing his claim. *See id.* at 53, 781 P.2d at 30 (defendant diligent where he "brought his condition to the court's attention shortly after its diagnosis"); *State v. Cooper*, 166 Ariz. 126, 130, 800 P.2d 992, 996 (App. 1990) (defendant appeared diligent in bringing claim "[a]lthough he waited almost one year after the diagnosis," where he "had blood tests done in the interim, apparently to monitor the stage of the illness"); *cf.* Ariz. R. Crim. P. 32.2(b) (notice of post-conviction relief

---

<sup>2</sup>To be eligible for relief under Rule 32.1(e), Sanchez also would have been required to establish that he was infected with the virus, without his knowledge, at the time of sentencing. *Bilke*, 162 Ariz. at 52, 781 P.2d at 29.

subject to summary dismissal “[i]f . . . meritorious reasons do not appear indicating why the claim was not stated . . . in a timely manner”).

¶4 Although Sanchez seems to argue some delay by his attorney caused the court to deny relief, we find no basis in the record to support his conclusion.<sup>3</sup> His Rule 32 attorney was appointed only after Sanchez filed his Rule 32 notice in 2008. In finding Sanchez failed to timely file his claim “after discovery of the ‘newly discovered evidence,’” the trial court apparently relied on the delay between Sanchez’s diagnosis in 2002 and his filing for post-conviction relief in 2008. This delay supports the court’s conclusion that Sanchez’s claim was not timely filed and that Sanchez had not demonstrated the diligence required to state a colorable claim under Rule 32.1(e).

¶5 For the foregoing reasons, although we grant review, we deny relief.

---

VIRGINIA C. KELLY, Judge

CONCURRING:

---

JOSEPH W. HOWARD, Chief Judge

---

PHILIP G. ESPINOSA, Presiding Judge

---

<sup>3</sup>Sanchez also appears to argue his Rule 32 counsel was ineffective. That claim is not before us on review. *See, e.g., State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues first presented in petition for review that “have obviously never been presented to the trial court for its consideration”); *see generally* Ariz. R. Crim. P. 32.9.